

THE MAKING OF  
SOUTH AFRICAN LEGAL  
CULTURE 1902–1936  
FEAR, FAVOUR AND PREJUDICE

MARTIN CHANOCK

*La Trobe University, Australia*



**CAMBRIDGE**  
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE  
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS  
The Edinburgh Building, Cambridge, CB2 2RU, UK    www.cup.cam.ac.uk  
40 West 20th Street, New York, NY 10011–4211, USA    www.cup.org  
10 Stamford Road, Oakleigh, Melbourne 3166, Australia  
Ruiz de Alarcón 13, 28014 Madrid, Spain

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First published 2001

Printed in the United Kingdom at the University Press, Cambridge

Typeface 10.5pt/14pt Minion. System 3b2 [CE]

*A catalogue record for this book is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Chanock, Martin.

The making of South African legal culture, 1902–1936: fear, favour, and  
prejudice / Martin Chanock.

p. cm.

ISBN 0 521 79156 1 (hb)

1. Law – South Africa – History. I. Title.

KTL120.C48 2000

349.68–dc21 00–037893

ISBN 0 521 79156 1 hardback

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## Four stories

The Union of South Africa, created in 1910, was an unstable state. It was the political outcome of the South African War between the Afrikaner Republics and the British empire. Though the war had ended in 1902, the issues over which it was fought were not laid to rest, and continued to call into question the legitimacy of the new state for decades. In addition to Afrikaner republicanism the state had to face a powerful new challenge from the largely British South African white labour movement, and the elemental task of maintaining white rule over the black majority. In the period after 1902 the country faced several major political revolts. In Natal a Zulu rebellion was defeated in 1906. In the Transvaal strikes by white workers led to violence which necessitated repression by military action in 1905–07, 1913–1914 and 1918, and which culminated in an attempt at revolution in 1922. In 1915 an Afrikaner republican revolt in the armed forces brought civil war to areas of the country. It is in this period of state making in a fiercely contested polity that South African legal culture and the legal system were developed.

This book locates the history of the formation of South African law in late nineteenth and early twentieth-century South Africa rather than, as other studies have done,<sup>1</sup> in Rome or Renaissance Europe. It places the

<sup>1</sup> E.g. Hahlo and Kahn 1968; Hosten 1983. Where the 'law' is situated in time and place is fundamental. The latter text, for example, begins with theories of law in Graeco-Roman times and then moves through medieval canon law; natural law; the Renaissance and English legal positivism; the European historical school and American realism. History begins with Roman law; then the twelfth-century Roman law revival; Germanic customary law and the reception of Roman law in the feudal Netherlands and the Dutch Republic. Only on p. 186 is South Africa reached, while the twentieth century is discussed on pp. 204–10. South African legal historiography is still largely trapped as a sub-category of white colonial and national narrative, from which the rest of South African historical writing has freed itself over the past three decades. But this latter historiography has not focused on the state (among exceptions are Posel 1991, Evans 1997 and Duncan 1995). Social and economic history and national and

development of this law within the context of the making of the South African state with a constitutional and statutory framework derived from the British imperial and colonial repertoire. And it shows how, by this state, two interdependent systems of private law were developed – Roman-Dutch law and African customary law. It tells not of the monologue of a developing legal ‘system’, but emphasises the multi-vocality and dissonance of a legal culture within a state based on racial dominance. The book is an account not simply of South Africa, but of the expansion of European law in the colonial period, a significant time of legal globalisation. This account was written after another period of intense conflict, and the subsequent creation of another new South African state, and it tries to provide a frame within which to understand the connections between state making and legal culture, now proceeding in a post-colonial context as a part of a new globalising law. To illustrate the themes of the book I begin with four stories, chosen from a vast range of possibilities, in order to underline that legal history is a myriad of narratives, each set in its own context. A conventional methodological introduction follows in chapter 2.

### **A trial**

In November 1921 Enoch Mgijima and 140 others, some on crutches and with limbs missing, all with numbered cardboard tickets dangling from their necks, were tried for sedition and public violence in Queenstown.<sup>2</sup> Nearly two hundred people had been killed: the survivors were on trial. Unable to afford a barrister, they were, with special leave of the court for the first time in over fifty years, defended by a local solicitor. There was rather more specialised expertise on the Crown’s side. The prosecutor (who had ‘a vast amount of experience of large native trials’) had conducted the Crown case in the trial of the Zulu King, Dinizulu, and prosecuted in other major cases following the Natal rebellion, and had prosecuted the Indians charged after the Natal strike of 1913.

I present here only the story as seen through the prism of the legal

class struggle have been the major concerns, rather than the complexity of the state and its bureaucratic enterprises. This focus may change as the new state, no longer a hostile force, embarks on its project of reconstruction.

<sup>2</sup> My account is based on the reports in *The Star* for December 1921, in particular Judge Graham’s summing up reported on 6 December.

proceedings, with their power to mould and to mock, and to shape not only a narrative but a frame of meaning. Exhibited in court were swords, scabbards made of paraffin tins, assegais and knobkerries, as well as Enoch Mgijima's robes of office, seized from his home. 'One of the robes was a resplendent affair of cerise silk, edged with gold lace. There were three caps. One roughly in the shape of a cardinal's cap, was made of blue plush, with a crown of scarlet. It was encircled with four thin strips of gold lace, and at intervals were four large stars.' Also on exhibit were Enoch's dreams. Prominent in evidence of seditious dreaming was his vision of two white goats fighting, and a baboon which had seized them both and crushed them. The court accepted the evidence that to Mgijima 'the white goats were the Europeans, and . . . the other animal was the natives, and that it meant that the white people should be crushed by the natives' (Graham JP's summing up).

The actual point of conflict between the so-called Israelites and the state was occasioned by the illegal occupation by sect members of a part of the commonage of the densely populated location at Bulhoek. In essence Mgijima and his followers defied an ejection order. There was intense pressure on the limited land available for African occupation around Queenstown (see chapter 15). Title holders in the location had small areas for cultivation, and made use of a common for pasture. Pressure on such grazing land was intense in the Eastern Cape where the population had outstripped the land available under the 'Glen Grey system' of title, and illegal occupation and cultivation were far from uncommon. The occupation had first been reported to the Department of Native Affairs in 1914, the year after the passing of the Land Act and the time of maximum hysteria among both white and black over the rights of Africans to land. When the head of the Native Affairs Department, Edward Barrett, visited the area in 1920 he found a situation in which control over the occupation of land in the location had virtually broken down. Several hundred people were squatting on the common. But, while he admitted that he had been 'amazed' at the extent of the settlement that had taken place due to 'imperfect' administration of the land laws, he had seen 'similar troubles' in other locations. Pragmatically the officials tried to register the occupants, rather than moving to eject them by force. Barrett even engaged in ideological debate with Enoch Mgijima. He admitted Mgijima's claim that the ground was 'God's ground' and that the Bible said that 'the earth was the Lord's and the fullness thereof'. On his part he wielded the alternative

text of Romans chapter 13 ('Let every soul be subject unto the higher powers . . . the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God'). However for Barrett the real text to be deployed was the Locations Ordinance, while for the Israelites it was increasingly in the world of religious injunction that the issue of the search for land on which to live, and the battle against the white state's prohibitions, were to be situated. Enoch preached, according to the evidence of followers, that after the conflict they would go to Jerusalem on a wagon that 'travelled in the air . . . those who were freed would go . . . Those who escaped when the whole earth was set on fire would get onto that wagon and be borne away.' 'What were you to be freed from?' asked Graham aggressively. 'Why were you anxious to go to Jerusalem?' 'I wanted to go there to rest,' said the witness, evoking the longing to escape the harshness of South African life rather than the will to rebel. 'The time has come,' said another. 'We have seen by the Watchman that Jehovah is coming down with his armies.'

The moment of the killings was confusing. Confronted by the police, and in a hail of fire, the Israelites ran forward. In the recollection of one witness 'there was all dust and confusion and we didn't know what we were doing'. But another strand of the evidence also told of a narrative more purposeful than confusion and the promise of Jerusalem. According to an African police witness one of the accused had spoken to him about the contemporary disturbances in Johannesburg and Port Elizabeth and asked, 'Does it not stir your hearts to see the blood of your brothers being spilt?' Another had attended a meeting at which one of the accused had preached against further tax paying and proclaimed that 'we have grown tired of being under the rule of the white man'. Other evidence concerned the colonial staples – driving the British into the sea and bullets turning to water. Enoch Mgijima, according to Graham, had 'preached that the hour of the black man was coming'. Graham mocked the defendants in his summing up. They had been attracted to the sect, he thought, by 'the indiscriminate kissing that went on between men and women' (the 'holy kiss' had been made much of by the press) and 'the entire absence of any work must have been a great attraction'. But they had more than the usually attributed characteristics of promiscuity and laziness; they were also revolutionaries. What bound these people together, said Graham, was not religion, which was a 'cloak' but 'the real bond . . . was the crazy notion that the day was coming when the black man was to have his

freedom'. Like the Israelites the court magnified the local moment. Each instant of confusion and defiance was never far, in the minds of the rulers, from a wholesale black rebellion. This is why the ultimate cause of the disaster, in Graham's view, was the weakness showed by those in authority. Allowing the initial occupation to continue had been a 'sign of weakness', showing that local officials had 'no authority' over those under their charge. A 'vacillation, a shirking of responsibility' had characterised the dealings of the higher officials who had come into contact with the Israelites. Dr Livingstone was quoted as authority for the proposition that black men should not be threatened with firearms unless there was intention to use them. The initial show of force by the police, which had failed, was condemned. The effect had been 'deplorable'. There was no other instance, said Graham, 'in the long record of native disturbances' where nearly a hundred 'armed and disciplined men were compelled to retreat before a body of natives armed with swords, assegais and knobkerries'. The attempts of the then political authorities to negotiate a way out of the impasse were considerable. The Secretary for Native Affairs had come; so had the members of the Native Affairs Commission; and they had brought a delegation of prominent Africans, including Tengo Jabavu and Pellem, and there had been a serious prospect of a meeting with the Prime Minister. In the end the judge, while finding no fault with the police on the day of the massacre, condemned the processes of negotiation: 'All seemed to have forgotten that in dealing with the natives a legacy of sorrow and blood invariably follows in the wake of misplaced clemency.' Even Sir James Innes, who has the reputation of having been the most 'liberal' of South Africa's senior judges during this period, could only record in his memoirs that Bulhoek was an instance 'of the impressionability of the Bantu race, and of its recklessness when aroused, which lawyers and administrators would do well to bear in mind' (Rose-Innes 1949: 283). The government learned from Judge Graham's views about strength and weakness. Barrett, despised as weak, lost his job as Secretary for Native Affairs. Colonel Truter, who had commanded the slaughter, became the national commander of the police.

### **An execution**

In November 1922 Samuel (Taffy) Long was sentenced to death by a special criminal court. Long had lived in his moments of violence inside

another millennial dream and mounted the gallows singing 'The Red Flag'. While in this case the victorious were not to be carried away from a burning earth in a flying wagon, but would inherit a classless and exploitation-free world (and, in the local formulation of the ideal, a white South Africa), there were vital parallels in both the local impulse to erase the existing injustices and the link with a larger external doctrinal canon of total redemption. The murder of which he had been convicted arose out of the events of the attempted revolution, inspired and led by white labour, on the Rand. In the course of the revolt nearly two hundred and fifty people were killed. Special courts, created so that offences arising out of the rebellion would not come before juries, later convicted eighteen men of murder, and sixty-seven of treason and sedition (Simons and Simons 1969: 296). Of the four men who were hanged, it was Long's case that created the most controversy. Long was tried twice. The killing had not taken place in the heat of the moment, but had been the result of a 'trial' of a local grocer as a suspected spy after which Long had carried out the death sentence. At his first trial the court comprising Dove-Wilson, de Waal and Stratford failed to reach a verdict. The government ordered a second trial, which was presided over by judges Mason, de Villiers and Curlewis. This court found Long guilty and sentenced him to death.

While the court made no public recommendation for mercy it addressed a confidential recommendation to the Governor-General, Prince Arthur of Connaught, with whom lay the royal prerogative of mercy. The judges unanimously recommended commutation of the sentence 'having regard to the circumstances of the time . . . and to the fact that the accused purported to carry out what was apparently the sentence of a Court Martial' (SA Archives GG S1/6525).<sup>3</sup> The Governor-General consulted his ministers. Cabinet discussed the case and advised unanimously that the sentence be carried out. Jan Smuts, the Prime Minister, rejected the judges' argument that Long had had no personal animosity against the accused, observing that 'neither had Stassen [who had already been executed in relation to strike related killings] against the Natives whose lives he took', and, with an aim at imperial sensitivities, 'neither, if an analogy be drawn, have the Irish rebels against the people they do to death'.

<sup>3</sup> This account is based on the dispatch sent by the Governor-General to the Secretary of State on 15 November 1922 (SA Archives GG: S1/6525).

Constitutionally the prerogative of mercy was the Governor-General's alone 'according to his own deliberate judgement, whether the members of the Executive concur therein or otherwise' (Royal Instructions: Article IX). 'There were', he wrote, 'only two courses open to me. I had to decide between the judges who are regarded as impartial and experienced administrators and the politicians who are believed to be biassed by party policy and party prejudice.' Initially it appeared as if he would accept the judges' recommendations. Three judges had failed to agree as to Long's guilt, and three had recommended mercy. But the Prime Minister threatened that if this was done he would resign. He gave

a very interesting and convincing exposition of the problem . . . the general theme of his argument being *salus populi suprema lex*. Had this been an isolated murder, he said, he would not have disputed the opinion of the judges. But he contended that the crimes committed during the rebellion were of an extraordinary nature involving something more than the purely legal view. High policy was affected. For years past the progress of South Africa had been arrested by frequent outbursts of lawlessness and revolution . . . the country had reached a world position that demanded some evidence of permanent stability . . . [and needed to] demonstrate clearly that any attempt to overthrow constituted authority would be severely dealt with . . .

Speaking of the judges he confessed he was unable to understand what considerations had induced them to recommend mercy. He could only attribute their action to nervous strain brought about by continuous work on these capital cases.

The exercise of the prerogative in Southern Africa had been politically charged before. Lord Gladstone had been publicly vilified for his intervention in what was known in South Africa as a 'black peril' case, i.e. a rape of a white woman by a black man. More to the point, Smuts reminded the Governor-General that the Governor of Natal had wished to go against the Natal government over sentences after the Zulu rebellion of 1906, but had been humiliated into backing down by that government's threat of retaliation.

In the face of this Connaught abandoned his inclination towards the judges. But he persuaded Smuts to allow the Judge-President of the Court, Sir Arthur Mason, to explain the judges' reasons to the Executive Council. When the council met, Connaught opened the proceedings by announ-

cing that he supported the ministers. Mason then spoke. In the words of Connaught's account:

In the first place he contended that the Government could not absolve itself from a measure of blame inasmuch as he believed the policy adopted in this and previous disturbances was to some extent responsible for the strikers having recourse to armed resistance. With regard to Long he claimed that five out of six of the judges who sat on the case were in favour of commutation of the sentence for the following reasons. Fordsburg was being held by the strikers against the Government forces with little prospect of ultimate success. 'Spy mania' was rife and the Court was convinced that Long and his associates honestly believed that Marais was guilty of spying and had attempted to indicate their positions to the police.

Long, he continued, was an instrument in the hands of a court martial composed of 'strike ringleaders' and subject to 'the excitement prevailing at the time'. The ministers were unmoved and the sentence of death was confirmed. In his final remarks Connaught denied that he had surrendered his prerogative to ministerial threat, claiming that there had really been no difference of opinion. He concluded with observations on the constitution. Whereas, he wrote, 'in the United States, Canada and Australia the Constitution is supreme, the Act of Union, in letter and spirit, endeavours to subordinate the Constitution to Parliament'. The government, in other words, had to prevail.

These stories contain many strands which we shall follow in this book. The second illustrates above all the primacy of reasons of state, of the early invocation by the Prime Minister of the maxim that the safety of the state was the supreme law. It displays too the ambivalent position of the judges: accorded some respect, yet without final power. We can see too that judiciary and executive did not necessarily have predetermined structural stances. In the Bulhoek trial it was the executive that had leaned towards leniency and the Judge-President who had bayed for punishment, while in Long's case the positions were reversed. And it shows the combination of the respect for legal niceties, and formalism, with the willingness to discard them. Long's trial was one of a number of political trials during the period covered by this book in which issues of the legitimacy and the basis of existence of the state were concentrated in a single trial. The trial of Dinizulu, the Zulu monarch, for treason in 1906, was one; that of Jopie Fourie, the Defence Force officer executed for treason in 1915, was another; the trial of the survivors of Bulhoek a third. The fragility of the

state, and the relationship between force and law, in these and hundreds of other 'political cases' were the background against which legal doctrine was developed (see part II). The role of judicial institutions, and legal doctrine, in the face of political unrest and revolution remained a feature of South African legal history throughout the history of the white-ruled state. And we can see also hints of other contemporary themes. The view that the constitutional design of the Union entailed the supremacy of the government over the constitution was to be affirmed in the struggle between the Appeal Court and the government in the 1950s. And, of perennial relevance, the expressed need of the state to demonstrate internationally that it could maintain law and order continued to be an ingredient of South African legalism.

The structure of oppression, and of struggle, gave a form to both stories. In both the localness of the struggle, in Fordsburg and in Bulhoek, was linked by all the participants to a larger cosmology of struggle, victory and defeat. The local event was transformed into a larger one by linking the limited actions to a vast pattern beyond: of the redemption of the world, of proletarian revolution, a final setting to right and crushing of wrong, which gave meaning to the local events. The state's response was in a similar manner made up of the mundane and the apocalyptic: the application of the criminal law, and the defence of the white race and its civilisation. In these acts of rebellion it is not surprising that the conflict should quickly become dramatised and enlarged. But, given the overall framework of oppression, this possibility was immanent in a very wide range of legal encounters. Two dreams of redemption, the brotherhood of man, and the coming of Christ, and two languages, the words of 'The Red Flag' sung on the gallows, and the sermons on flying to Jerusalem, embodying the visions, white and black, of a life beyond the oppressions of South Africa, both ended in courts to be evaluated by the language of the laws of sedition, treason and crime. In this confrontation, where the overwhelming anxiety of those who controlled the legal institutions was to protect authority, there were no echoes in the law of the visions of justice presented to it, no traces of a common link or language between rule and justice. It is here that we might begin our understanding of the meaning, in South Africa, of government under law.

### **A case at common law**

In the first two stories we saw how legal actors and institutions confronted alternative dreams of justice. In both cases the core issue was the authority of the state. In one the audience was internal and African. In another it was white, and both internal and international. In both cases a message – the implacable will of the state to rule – can be distilled. My third story is of a different kind, far divorced from the high stakes and dramatic circumstances of rebellion, death and state power. It also raises questions about the audience for legal discourse and decisions in a different way, one which must lead towards the posing of questions about the ‘rationality’ of law, even within a quintessentially ‘legal-rational’ system. It concerns a simple dispute over a rural commercial transaction, which raised problems in the law of contract which found their way to the Appellate Division. The law of contract does, of course, embody a millennial dream of a kind, of the voluntary reaching of agreement, without oppression, between freely contracting parties, but it also embodies an ideology of compulsion which as I shall show in this book was to be of great significance as a legal weapon in the South African social order, as much a part of domination as the power to execute and imprison. But in all three of the stories what I want to draw attention to is the extreme disjunctures that exist between the world of the law and those of its subjects, gaps which require more from our understanding of law than a simple faith that they can be explained either in terms of legal doctrine or setting the law in its social context. In *Long’s* the circumstances concerned the conduct of a trial claimed to be valid in a revolutionary context. The state said he had committed murder and hanged him. But mutual comprehension was complete, though the worlds of justification were vastly different. In the case of the Israelites there was little mutual comprehension and no way of bridging the gap between the fiery chariot rising to heaven and the court which could have resort only to oppressive ridicule. In the third of the stories the gap is of a different kind. It is simply that the parties could not have begun to imagine the nature of the legal reasoning that would be applied to their dispute.

As this book will show, while South African judges developed the Roman-Dutch law as the common law of the country, the state made considerable efforts to keep Africans confined within a customary law of their own believed to be more suited to their stage of evolution. However,

within a setting of economic integration between black and white this created all sorts of difficulties. What was clear, however, was that the whites' Roman-Dutch law always applied to transactions between African and white. Such disputes did not often reach the appellate courts, and I have chosen one of the rare ones that did in order to raise questions about the relationship (if any) between formal legal discourses and 'society'.

In 1916 an African farmer named Mapenduka in the Eastern Cape bought 152 bags of maize from a white trader called Ashington for £109. Peasant farmers were no longer self-sufficient in food. Selling part of their crop after harvest to meet their tax burden, as well as to buy newly available goods, they frequently found themselves re-purchasing maize at higher prices later in the year. As they more often than not had little money income and no assets other than stock, Africans who sold and bought grains in this disadvantageous exchange typically found themselves deeply in debt. Sometimes traders would treat the debt as an advance against labour services, and a sort of peonage developed. In other cases traders acted as labour agents who recruited their debtors as mine labourers. In others it was common to pledge stock against future payment. In this case Mapenduka pledged six oxen, a cow, a calf and a horse. He was not able to meet his debt when it fell due. Ashington believed that the property in the pledged stock passed to him. However, some time later Mapenduka was in a position to meet his debt, tendered £109, and claimed return of the stock. But only one ox remained in Ashington's possession. Mapenduka sued him for the difference between the amount of the debt and what he claimed was the value of the stock, a sum of £51.

He lost. Hutton J accepted Ashington's version of the history of the transaction and the evidence of a local auctioneer that Mapenduka's valuation was 'absurd for native oxen', and that they were worth no more than the debt owing (*Mapenduka v Ashington* 1918 EDL 299 at 307). But the judge had also to deal with the claim that a contract by which the creditor took possession of pledged property on default of payment was oppressive and therefore void. Both parties, it appeared from the evidence, had believed that ownership of the goods would pass if the debt was not paid. In giving judgment he added to the usual citations from Voet and van der Linden a mixture of civil and common law authorities – Donat's *Civil Law*, and Storey on *Bailments* and *Equity Jurisprudence* (308). He was reluctant to find the contract void and also quoted approvingly the dictum of Sir George Jessel:

You are not to extend arbitrarily those rules which say that a given contract is void as being against public policy because if there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. (309)

Denied political equality and deemed to be racially inferior and culturally backward, Mapenduka and other Africans were nonetheless of 'full age and competent understanding' in relation to their contracts.

Mapenduka appealed (*Mapenduka v Ashington* 1919 AD 343). In the Appellate Division Judge Hutton's English texts were trumped. The litigants were met with the determination of the judges to develop and display the fully flowering jurisprudence of the Roman-Dutch law. All was not so simple and it took close to twenty pages to show it. De Villiers AJA opened his account with laws going back to the emperor Constantine, as well as quoting Voet, to the effect that pacts which treated the pledged goods as belonging to the creditor were oppressive. On p. 352 he referred to 'a rescript of the Emperors Severus and Antonius probably altered by Tribonian' and four lines in Latin were quoted. De Villiers observed: 'It will be noticed that there is an important difference between the rescripts and the language of Voet.' He pursued the issue of limitation of freedom of contract when the contract was oppressive into the works of Pothier and van Leeuwen (352–3). Maasdorp JA was not to be outdone. He began with Justinian's Code and moved on to the jurists of Germany and France, invoking Carpzovius' 'Law of Saxony' as well as van Gluck and Pothier (357–8). The point as to whether there had to be a price fixed by agreement for the pledge, or a 'just price' was further followed in German jurists Thoasius and Huber (356–9).

It was all a most impressive display of scholarship and typical of the style of judgment of the court in this period. Actually they need not have gone through all of this at all. While the law may have been in some senses on his side, in that the authorities regarded as oppressive a contract in which property in the pledge passed regardless of value, Mapenduka received nothing as the judges accepted the evidence that there was no difference between the value of the pledged stock and the maize. But what is clear is that the judgment could not only have meant nothing to the parties but would also have been unintelligible to most South African legal practitioners. The judges could perhaps be seen to be using the case to

develop an area of the law. The rationality and liberality of the Roman-Dutch law was proven, upholding Mapenduka's counsel's legal point, even though it was irrelevant to the result. But, in this most banal and secular of cases what they were also doing was stamping not only their ownership but also their mystical authority as expounders of a theology not approachable by any but a handful of adepts. It was not simply a case of the law being complex – which is normal – but one in which its derivation and language were entirely external to the society it ruled. The very complexity so lovingly displayed set it apart from what was often reiterated about African law in relation to contract, that it was simple, if it existed at all. Standing at the very boundaries of civilisation between those who had law and the lawless, the judges unsheathed their most important weapon, the golden thread of continuity which made them a part of the jurisprudential learning and traditions of Europe.<sup>4</sup>

There are a number of ways in which this judgment can be read. As an exercise in scholarship it can be read with pleasure. But it should also be read with incredulity if one asks why Carpzovius' 'Law of Saxony' or the rescripts of the emperor Severus could have been applied to Mapenduka's oxen. Neither Hutton nor the appellate judges had any thought for the concepts of right and law which might have been in the minds of the litigants. Mapenduka would have been familiar with the local African law relating to loans and pledge of cattle which was applied to disputes between Africans. Probably Ashington would have had a greater familiarity with the local customary law than with the law applied. The narrative here is one of 'whose law', and the court was making very clear that it was not Africa's. And then there is the question of the relationship of law and judges to power. In Long's case the implacable power of the political state overrode the judges. In the second story, the court itself abusively associated itself with the police killings. In Mapenduka's case the court apparently abased itself before the authorities which it called on to exercise

<sup>4</sup> This imaginative choice of where to situate the law can be illustrated in another way. In *Lennon Ltd v British South African Company 1914 AD 1* the court had to decide whether the doctrine of contributory negligence was a part of South African law. Solomon J said simply it had been 'frequently recognised by our Courts that on this subject there is no essential difference between our law and that of England'. This was not enough for the Chief Justice who wanted to derive the principle from another place: 'In the Digest Ulpian is quoted (7, 2, 9 Sec 4) . . . as laying down that if a slave was killed by persons throwing javelins for amusement Aquilian law was applicable, but not if the slave was passing at an unreasonable time over a field devoted to such exercise.' Can we wonder why it seemed quite natural to him to find the law among careless slaves spoiling their masters' pastime?

its right of final decision. The self-image in the application of the Roman-Dutch law was one in which the judges were subjects of the authority, yet there was no greater exercise of power than the application of these 'authorities' to the transaction between Mapenduka and Ashington.

Rosen has written of Moroccan court settings that speech in them is continuous with that of the rest of society and provides a 'frame for cultural understandings' (see Mertz 1992: 426). Yet in South Africa there was an absolute discontinuity between language in legal settings such as these and language in the rest of the public domain. Such discontinuities between formalist and popular language are present in many legal systems. English judges have had resort to Latin, legal French and Middle English. But here they were a part of the exercise of power by one race over another. This use of language needs to be highlighted at the outset and is underscored by the fact that when state officials other than judges talked about law arcane language was not used at all.

### **Resistance: an uncommon lawyer**

The first of these stories concerns the relationship between courts and people, whose voice is absolutely subordinated; in the second the thematic issues are illustrated in a relationship between state and judges and in it the determinant and dominant voice is that of the state; in the third the judges construe the 'authorities' which appear to dominate both them and the litigants. In the fourth story I look for a different voice, developed in the struggle of subordinated people against law. But I have chosen a lawyer's voice, that of the most significant figure to have practised law in South Africa in this period, because it is crucial to be aware that within the law (though at its very fringes) genuinely alternative voices were formulated and heard. Over the objections of the Natal Law Society M. K. Gandhi was admitted to practice in Natal in 1893. (In the Transvaal, after the war, the Law Society did not oppose his admission.) The story of his assumption of the leadership of the Indian struggle in the Transvaal and Natal has been often told (Gandhi 1928; Swan 1985; Huttenback 1971). The events into which he was drawn were but one facet of the discreditable aspects of the imperial government's restructuring of the Transvaal after the war. It was a feature of that regime that, building on the principle of legal continuity with the former republic, its programme of reform was essentially one of enforcing, with greater efficiency, the discriminatory

legal regime about which its propaganda had been so critical before 1899. Gandhi acutely summed up the difference between the administration of the anti-Indian laws in the Boer republic and the Transvaal. The British 'rule of law' meant not greater liberty, but stricter enforcement of rules. In the republic the 'drastic' laws had not been strictly enforced. However, he wrote, 'under the British Constitution . . . if the policy of the Government is liberal, the subjects receive the utmost advantage of its liberality. On the other hand if their policy is oppressive . . . the subjects feel the maximum weight of their heavy hand' (Gandhi 1928: 79–80). The anti-Indian policies of the Republic were stiffened. In its attempt to prevent Indian immigration to the Transvaal Milner's government introduced what came to be known to the Indian community as the Black Act which required registration and fingerprinting of all Asian residents. After the first phase of Indian resistance the law was disallowed by the Colonial Secretary Lord Elgin, but immediately reintroduced and passed in March 1907 when Responsible Government was bestowed upon the Transvaal.

There followed a prolonged campaign of defiance against the law. Among 150 Satyagrahi prisoners in the first batch, Gandhi was sentenced to two months in prison in January 1908. He recorded: 'I was standing as an accused in the very Court where I had often appeared as counsel. But I well remember that I considered the former role as far more honourable than the latter' (137–8). He was summoned from prison after three weeks for the first of many meetings with Smuts, who opened with the curious appeal 'You know I too am a barrister', underlining the English legal education that they had in common (144). He offered, in Gandhi's account, a repeal of the Black Act in return for voluntary registration. The prisoners were released. Amid scenes of violence in which Gandhi was severely assaulted by Indian dissidents, he led the acceptance of registration. But the Act was not repealed. The two men disagreed, not for the last time, over what undertakings had been given. After an impassioned campaign over broken pledges a public burning of the registration certificates took place at a large meeting in August 1908. Gandhi witnessed: 'The Negroes of South Africa take their meals in iron cauldrons resting on four legs. One such cauldron of the largest size available had been . . . set up on a platform . . . in order to burn the certificates.' Over two thousand certificates 'saturated with paraffin' burned (185–7).

The struggle continued. Violence, imprisonment, deportations, marches and hunger strikes swelled the ranks of the Satyagrahis. They

grew to include Indian strikers on the Natal coalfields and then the cane estates, whose actions were attacked and suppressed by police and military force. Eventually women were drawn into the realm of public violence. The Indian struggle draws our attention to curious aspects of South African patriarchy. The South African state hesitated over extending the pass laws to African women. The overall willingness to leave and preserve the control of African men over women in the customary law were features of a nervousness about the extent to which state power could be extended in this sphere, and a state willing to allow that subordinate populations were ready and competent to be trusted to exert control, not over themselves, but over 'their' women. The original provisions of the Transvaal 'Black Act', which would have required the fingerprinting of Indian women, were greeted with 'shock' and 'a fit of passion' (94). Faced with the ferocity of the Indian determination to 'protect' their women, the single important concession freely made by the Transvaal government to the Indian resistance was to withdraw its insistence on compulsory fingerprinting of women. Gandhi also relates the eagerness of many women to take part in the Satyagrahi struggle. He was unwilling to send them 'into the firing line', and, he wrote, 'another argument was that it would be derogatory to our manhood if we sacrificed our women in resisting a law which was directed only against men' (251). Only when the struggle against the non-recognition of Indian marriages directly affected women were they permitted to join.

There are other important themes raised by these events. I have noted above the importance in South African legal culture of the processes by which the identities of self and other were established. Gandhi perceived that this was central to the fiercely anti-Indian laws of the Transvaal. He observed that 'a bare-faced selfish or mercantile argument would not satisfy . . . The human intellect delights in inventing specious arguments in order to support injustice.' The argument put forward by whites in South Africa was that 'South Africa is a representative of Western Civilisation, while India is the centre of Oriental culture. Thinkers of the present generation hold that these two civilisations cannot go together.' Thus the Indian question was presented, Gandhi wrote, not simply as trade jealousy or race hatred, but as what he called a 'pseudo-philosophical' and 'hypocritical' opposing of cultures (83–4). Another theme concerns the remnants of British authority in South Africa. A misplaced faith in 'English' justice and the power of the Crown to protect the oppressed in

South Africa was manipulated by the constitution. The myth did serve to mislead African opposition movements until well after the First World War. However, the fact that it was possible in the context and structure of imperial politics to influence South Africa's laws was evident by the interventions of the Indian government in the period after 1910. A third theme to which much attention will be paid in what is to follow concerns the position of Asians in South African law. Because Asians could not, like Africans, be relegated to a different legal regime, but had to be discriminated against within and by the ordinary law, they posed many of the most difficult problems to South Africa's lawyers.

The experience of the campaign, in particular the final phases where the government forced strikers in Natal back to work by police and military action, led Gandhi to reflect further on the nature of South African legality. 'Authority takes the place of law in the last resort,' he wrote. Yet he conceded that it was 'not always objectionable . . . to lay the ordinary law on the shelf'. An authority 'charged with and pledged to the public good' was entitled, when threatened with destruction, to disregard legal restraints. 'But occasions of such a nature must always be rare.' Furthermore, 'the authority in South Africa was not pledged to the public good but existed for the exclusive benefit of Europeans only . . . And therefore the breach of all restraints on the part of such a partisan authority could never be proper or excusable' (288–9).

What was the overall effect of the Satyagraha campaign on the legal culture within which it was waged? It did pose a pointed challenge to the colonial state and its command system of law. As Gandhi said in 1928, 'Whether there is or there is not any law in force, the Government cannot exercise control over us without our co-operation . . . But a Satyagrahi differs . . . if he submits to a restriction he submits voluntarily . . . We are fearless and free' (147). Such an attitude produced in response a greater emphasis on force and punishment. It contributed to the sense of righteous implacability that was the primary spirit of law making and enforcement. The movement truly tested the limits of the law-making and law-enforcing power. As Gandhi wrote in his concluding remarks on his South African experience, capturing the essence of the legal culture: 'A thing acquired by violence can be retained by violence alone' (306).